

Iyangbe (Migration) [2018] AATA 5268 (12 November 2018)

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DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Mr Uyi Gabriel Iyangbe

VISA APPLICANTS: Mrs Majemite Daisy Iyangbe (first named)
Master Osarugue Paul Iyangbe (second named)

CASE NUMBER: 1807628

DIBP REFERENCE(S): BCC2017/4062367

MEMBER: Stavros Georgiadis

DATE: 12 November 2018

PLACE OF DECISION: Adelaide

DECISION: The Tribunal remits the applications for Visitor (Class FA) visas for reconsideration in respect of all applicants, with the direction that the first named applicant meets the following criteria for Subclass 600 (Visitor) visas:

- Public Interest Criterion 4020 for the purposes of cl.600.213(1) of Schedule 2 to the Regulations;

4. and that the second named applicant meets the following criteria for a Subclass 600 (Visitor) visa:

- Public Interest Criterion 4018 for the purposes of cl.600.213(2) of Schedule 2 to the Regulations.

5.

Statement made on 12 November 2018 at 4:33pm

CATCHWORDS

MIGRATION – Visitor (Class FA) visa – Subclass 600 (Visitor) – provided bogus documents and false and misleading information – employment documents – human resources

outsources to external organisation – member of the family unit – best interests of the child – decision under review remitted

LEGISLATION

Migration Act 1958, ss 5, 65

Migration Regulations 1994, Schedule 2, cl 600.213, Schedule 4, Public Interest Criterion 4018, 4020, r 1.12

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

6. This is an application for review of decisions made by a delegate of the Minister for Immigration on 29 January 2018 to refuse to grant the applicants Visitor (Class FA) visas under s.65 of the *Migration Act 1958* (the Act).
7. The applicants applied for the visas on 2 November 2017. The delegate refused to grant the visas on the basis that the first named applicant (the applicant) did not satisfy the requirements of cl.600.213(1) of Schedule 2 to the Migration Regulations 1994 (the Regulations) because the delegate considered the applicant had provided bogus documents and false and misleading information to the Department in respect of her employment with the Delta State Government of Nigeria, and the delegate considered there were no compassionate or compelling circumstances that should be waived for the purposes of PIC 4020(1).
8. The delegate refused the application in respect of the child applicant, Master Osarugue Paul Iyangbe, on the basis that it was in the best interests of the child to stay with his mother and therefore, could not satisfy Public Interest Criterion (PIC) 4018. It follows that if the visa application is approved for Mrs Majemite Daisy Iyangbe, the child's visa would also be approved.
9. The review applicant appeared before the Tribunal on 12 November 2018 to give evidence and present arguments.
10. The review applicant was represented in relation to the review by his registered migration agent.
11. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

12. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.600.213 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10

years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).

13. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

14. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
15. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
16. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
17. The delegate considered employment related documents and information in arriving at the conclusion that the applicant had provided false and misleading information and bogus documents in respect of her employment with the Delta State Government of Nigeria.
18. As part of the evidence of the visa applicant's employment in her home country, she provided an Offer of Probationary Appointment to the Post of Fisheries Officer II issued by the Civil Service Commission Asaba Delta State, dated 13 October 2010. The applicant also provided a letter from the Ministry of Agriculture and Natural Resources Asaba Delta State Nigeria dated 10 October 2017 and signed by P. O. Esejo (Mrs) for Hon. Commissioner. The letter states that the applicant (planned) to be on annual leave from 11 December 2017 to 29 January 2018.
19. The delegate sets out that the Department conducted 'open search' checks and found 'no matches for Ministry of Agriculture and Natural Resources, no official telephone number nor official website for the employer and no match for the employer's name registered in Nigeria.' The delegate sets out that the search discovered that the employment letter presented 'appears not to have been registered with Nigeria official Government sites.' The Tribunal notes no *html* or other reference was made by the delegate to any web site(s) searched nor the specific search criteria of the 'open checks' made or search engine used.
20. Based on the above information, the delegate considered there was conflicting information relating to the applicant's employment and therefore, had 'reason to believe that the employment document may have been obtained fraudulently and that the applicant has

provided false and misleading information to the Department.’ The applicant was sent a request for comment on the suspected false information provided and was allowed 28 days to respond.

21. On 8 December 2017 the Department received a response from the applicant. The applicant declared that she is employed as a Fisheries Officer with the Department of Fisheries, Ministry of Agriculture and Natural Resources, Delta State in Nigeria. The applicant explained that her employer outsources most of their staff welfare documentation to consultants and that, since 2015, Heckerbella is the consultant organisation that manages Delta State Government employment details. The applicant also provided Biometric Identification documents from Heckerbella.
22. The delegate considered the response above, however was not satisfied that the evidence and information supplied with the application demonstrated the applicant’s employment status. The delegate noted in particular, that the employment letter presented by the applicant was of ‘very poor quality and lacked details of contact and an address where the office is located.’ Accordingly, the delegate was not satisfied that the applicant had ‘submitted credible confirmation of employment which can be verified through the internal human resources of the organisation.’
23. The Tribunal notes additional material has since been provided in support of the application and is discussed below. The Tribunal has had regard to the visa applicant’s statutory declaration dated, 22 February 2018 submitted as part of her application. The visa applicant refers in that document to the aforementioned identification and employment documents. However, at the hearing the Tribunal raised the issue with the review applicant that the visa applicant refers also to payment slips and bank statements. These appear not to have been before, or considered by, the delegate and were also not before the Tribunal at least in hard copy form.
24. At the hearing, the review applicant was able to retrieve these e-documents and provided a (certified) identification document and also payslips and bank statements to the Tribunal relating to the applicant’s employment with the Delta State Government, Nigeria. The Tribunal has carefully considered these documents in addition to those previously before the delegate. The payslip for June 2018 confirms the applicant’s designation as a Fisheries Officer in the Ministry of Agriculture and Natural Resources for the Delta State Government.
25. The visa applicant’s bank statements from Zenith Bank in Warri, Effurun, Nigeria show regular payments from Delta State Government (DTSG) Treasury made on a monthly basis to the visa applicant’s account. The bank account remains in the visa applicant’s maiden surname Arenyeka, which is consistent with earlier identification documents before the Tribunal. The Tribunal accepts that the reason for the maiden name listed on these documents is because the bank account had already been opened by the visa applicant before she married the review applicant on 22 July 2017. The amounts paid to the visa applicant from her government employment also cross-reference with the available payslips recording the visa applicant’s employment identification number, 1004027. The regularity of her pay is also consistent with the review applicant’s oral evidence, which the Tribunal accepts, that the visa applicant was paid on a monthly basis by electronic transfer of funds to her bank account. The identification details are consistent with the employment number on the visa applicant’s ID card and other employment documents that were cross referenced.
26. From this additional documentary evidence relating to the visa applicant’s identity, employment and payroll details, considered together with the available evidence before the delegate, the Tribunal accepts that the visa applicant is in fact, employed in the Nigerian Civil Service by the Delta State Government, Nigeria in the manner described by her.

27. For the above reasons, the Tribunal concludes that there is no evidence before it that shows the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth:

- a 'bogus document', as defined in s.5(1), i.e. a document that the Tribunal reasonably suspects is a document that:
 - purports to have been, but was not, issued in respect of the person, or
 - is counterfeit or has been altered by a person who does not have authority to do so, or
 - was obtained because of a false or misleading statement, whether or not made knowingly;

Nor:

- 'information that is false or misleading in a material particular' as defined in PIC 4020(5), i.e. information that is:
 - false or misleading at the time it is given, and
 - relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

28. in relation to the visa application or a visa held in the 12 months before the visa application was made.

29. Therefore, the first named visa applicant meets PIC 4020(1).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(1)?

30. PIC 4020(2) requires the Tribunal to be satisfied that the visa applicant and each member of the family unit have not been refused a visa because of a failure to satisfy PIC 4020(1) in the period commencing 3 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2AA).

31. There is no evidence before the Tribunal that the first named visa applicant or any member of the family unit (as defined in r.1.12) have been refused a visa in the relevant period because of a failure to satisfy PIC 4020(1), and the Tribunal so finds.

32. Therefore, PIC 4020(2) does not apply.

Has the applicant satisfied the identity requirements?

33. PIC 4020(2A) requires the applicant satisfy the Tribunal as to her identity. From a consideration of the certified identity documents also discussed earlier, the Tribunal is satisfied as to the visa applicant's identity.

34. Therefore, the first named visa applicant meets PIC 4020(2A).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(2A)?

35. PIC 4020(2B) requires that neither the applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2BA).
36. There is no evidence to suggest that the first named visa applicant or any member of her family unit (as defined in r.1.12) have been refused a visa in the relevant 10 year period because of a failure to satisfy PIC 4020(2A), and the Tribunal so finds.
37. Therefore PIC 4020(2B) does not apply.
38. On the basis of the above, the first named visa applicant does satisfy PIC 4020 for the purposes of cl.600.213(1).

39. The second named visa applicant - PIC 4018

40. As aforementioned, the delegate refused the visa application in respect of the second named (child) applicant, Master Osarugue Paul Iyangbe, aged 3 years. The refusal was on the basis that it was in the best interests of the child to stay with his mother and therefore, could not satisfy Public Interest Criterion 4018 for the purposes of cl.600.213(2). As the first named visa applicant's visa was refused, so was the child's. It follows that where the visa application is approved for Mrs Majemite Daisy Iyangbe, the child's visa would also be approved in his best interests as a member of the same family unit as the first named visa applicant (his mother) in a combined application.
41. The Tribunal is satisfied that the second named visa applicant has not turned 18 years of age and that there is no compelling reason to believe that the grant of the visa would not be in the best interests of the second named applicant.

DECISION

42. The Tribunal remits the applications for Visitor (Class FA) visas for reconsideration in respect of all applicants, with the direction that the first named applicant meets the following criteria for Subclass 600 (Visitor) visas:
 - Public Interest Criterion 4020 for the purposes of cl.600.213(1) of Schedule 2 to the Regulations;
43. and that the second named applicant meets the following criteria for a Subclass 600 (Visitor) visa:
 - Public Interest Criterion 4018 for the purposes of cl.600.213(2) of Schedule 2 to the Regulations.

Stavros Georgiadis
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s.5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...